

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department)	
of Telecommunications and Energy)	
on its own Motion to Implement the)	
Requirements of the Federal Communications)	D.T.E. 03-59
Commission's Triennial Review Order)	
Regarding Switching for Large Business)	
Customers Served by High-Capacity Loops)	

**JOINT DSCI AND INFOHIGHWAY VERIFIED
OFFER OF PROOF ON DS-1 SWITCHING IMPAIRMENT**

Introduction and Summary

Pursuant to the September 26, 2003 and October 14, 2003 procedural orders issued by the Department of Telecommunications and Energy ("Department"), DSCI Corporation ("DSCI") and InfoHighway Communications Corporation ("InfoHighway") (collectively, the "Carriers") submit this offer of proof on DS-1 enterprise switching impairment issues in the Commonwealth.¹ The factual statements herein with respect to DSCI and InfoHighway are verified by Sean Dandley, President/CEO of DSCI and Peter Karoczkai, Senior Vice President of InfoHighway, respectively.² This verified filing can serve as DSCI and InfoHighway's pre-filed testimony in this proceeding.³

¹ In response to the October 14, 2003 Order requiring the Carriers to submit this pleading notwithstanding an October 8 stay issued by the Second Circuit, the Carriers respectfully state their belief that proceedings should be stayed and that they are filing this pleading under protest and with all rights reserved to modify this document and the positions taken herein based on proceedings in the appellate courts or at the Federal Communications Commission ("FCC").

² Mr. Dandley and Mr. Karoczkai will adopt the statements herein under oath at any hearing in this docket.

³ Assuming it elects to proceed with this investigation, the Department should re-adopt the schedule

The September 26, 2003 Order (the “Order”) requested that docket participants “file statements of the case to be offered, alleging facts that would support such a finding of impairment, before the Department would proceed further in this investigation.”⁴ The Order asked participants to address, at minimum, (1) “specific geographic markets to be considered in making an impairment decision,” (2) “all facts that will demonstrate the existence or nonexistence of impairment in the proposed geographic markets,” and (3) “Verizon’s contention that the extent of actual deployment of switches in Massachusetts by competitive providers demonstrates that requesting carriers are not impaired without unbundled access to Verizon’s switches.”⁵

As demonstrated below, the Department should allow this investigation to proceed. DSCI and InfoHighway are successful and fast-growing competitive local exchange carriers (“CLECs”) that serve hundreds of small-to-medium sized business customers in the Commonwealth principally using unbundled network elements (“UNEs”), including the UNE-Platform (“UNE-P”) at the DS-1 level⁶ provisioned by the incumbent local exchange carrier (“ILEC” or “Verizon”).⁷ Thanks to hard work from the

established in its September 9, 2003 procedural order, except that the deadline for Verizon rebuttal testimony should be advanced by five days (to Friday, October 24 from Wednesday, October 29) in recognition that the Carriers’ case is in place more than a week ahead of schedule. This will afford time for some discovery in advance of hearing on any new or unanticipated claims in Verizon’s rebuttal case.

⁴ Order, p. 1.

⁵ Id.

⁶ DS-1 is a data signal level specification for digital streams at the T-1 transmission rate of approximately 1.5 megabits per second. DS-1 is commonly used to handle up to 24 multiplexed voice-grade telephone signal streams. A single voice-grade telephone signal is classified as a DS-0 level.

⁷ UNE-P refers to a combination of UNEs that typically includes the local loop, local switching, shared transport and tandem switching.

Carriers and other UNE-P CLECs, Massachusetts has been a national leader in DS-1 UNE-P competition, providing competitive alternatives to Verizon that have benefited all Massachusetts businesses and their customers and users. This segment of the business market would have no doubt grown even faster had Verizon been able to provision and repair DS-1 UNE circuits without significant technical problems. The serious threat of disruption to businesses of the Carriers and, more importantly, to the businesses and operations of their extensive DS-1 UNE-P customer bases, including many hospitals and other health care facilities, federal, state and local government agencies, manufacturing facilities, financial service organizations, and other single and multi-location business operations, require that the Department give this docket full consideration, and not terminate it arbitrarily without testing the validity of the statements raised in Verizon's September 16, 2003 Comments, that, among other things, requested that the Department close the instant docket without further investigation.⁸

The Carriers make the following offer of proof and requests for relief.

First. Because Verizon (1) has no process in place for accomplishing a seamless transfer of the Carriers' extensive DS-1 customer base from Verizon's network (including unbundled local switching) to alternative arrangements that would include non-ILEC switching, (2) has failed to respond to repeated requests by the Carriers to establish such a process, and (3) has repeatedly taken the Carriers' DS-1 circuits out of service during installations and repairs, the Carriers are operationally impaired with respect to their existing customer bases. The extent of deployment of CLEC switches in the Commonwealth is irrelevant if the Carriers have no process for transferring their

⁸ See Comments of Verizon Massachusetts dated September 16, 2003, at pp. 7-9.

customers from Verizon's UNE-P platform to other arrangements and no assurance that the transfers would occur seamlessly to CLEC switches without Verizon-caused service disruption. For these reasons, the Department should petition the FCC for a waiver at least with respect to the existing DS-1 customer base of all DS-1 UNE-P CLECs, including the Carriers, which should continue in effect until Verizon demonstrates that DS-1 cutovers can be accomplished seamlessly, in the same way the Carriers' UNE-P DS-1 customers could be returned to Verizon retail.

Second. The Carriers request that the Department petition the FCC for a waiver to preserve the Carriers' ability to demonstrate broader impairment in a future, more thorough, review of operational and economic impairment. In the Triennial Review Order⁹ ("TRO"), the FCC recognized that "a geographically specific analysis could possibly demonstrate that competitive carriers are impaired without access to unbundled incumbent LEC local circuit switching for DS-1 enterprise customers in a particular market"¹⁰ and created a procedural mechanism whereby UNE-P carriers can present data to individual state commissions showing that they are impaired without access to ILEC-supplied local switching.¹¹ The Carriers are certain that many geographic areas in the Commonwealth are impaired from providing DS-1 enterprise service in the absence of unbundled switching. They closely follow the DS-1 marketplace and have determined that CLEC DS-1 facilities are very limited in the Commonwealth, highlighting the

⁹ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (Aug. 21, 2003).

¹⁰ TRO, ¶454.

¹¹ Id., ¶¶454-458.

importance of Verizon-provided UNE facilities and switching. Gathering the data from Verizon and/or CLECs to identify the particular geographic areas where access to switching appear impaired, making the detailed showing of operational and economic factors needed to demonstrate impairment, verifying the information in hearings, and presenting that information to the Department for inclusion in a waiver petition cannot possibly be completed by early December, as is necessary to allow for sufficient time to prepare a Department waiver petition to the FCC. The impossibility of this task is amplified by the fact that a critical component of an economic impairment case, the final definition of the enterprise market – which encompasses both DS-1 UNE-P and an as-yet number of DS-0 UNE-P circuits – need not be determined by State utility commissions until the conclusion of the mass market case. Accordingly, the Carriers also request that the Department find – and request in the waiver petition to the FCC -- that (1) the 90-day timeframe established by the FCC does not afford the Carriers a meaningful time or opportunity to be heard on whether they are impaired without access to local switching to serve enterprise customers in geographic markets across the Commonwealth, and (2) evidence of operational and economic impairment may be presented at a later date, such as following the end of the mass markets impairment case.¹²

Third. Especially in light of the Department's jurisdiction over in-state telecommunications services and the failure of Verizon to establish a seamless transition process from Verizon UNE-P service to alternative arrangements, the Carriers request that the Department require Verizon to retain its current rates for local circuit switching

¹² The impossibility of litigating a full enterprise impairment case to conclusion within 90 days under the standards articulated by the FCC impelled the Carriers and other CLECs to seek the stay of the TRO that was granted by the Second Circuit on a temporary basis on October 8. The Carriers reserve their rights to change the above positions based on developments at the FCC or the appellate courts relative to the stay request.

until the Department has determined the lawfulness of any replacement rates for local circuit switching no longer required to be made available as an unbundled network element pursuant to 47 U.S.C. § 251(c)(3). Unless the Department requires Verizon to maintain existing local switching rates until it determines any replacement rate to be just and reasonable, and acknowledges the need to review the impairment issue once the inputs needed to show economic impairment are established following the 9-month mass-market local switching proceeding, competition for small and medium-sized businesses in the Commonwealth will suffer irreparable harm.

Offer of Proof on DS-1 Market and Impairment

A. Overview

In its September 16, 2003 Comments, Verizon claims that there are only 37 DS-1 UNE-P circuits in the Commonwealth and that the existence of CLEC switches demonstrates in and of itself that CLECs are not impaired without access to unbundled enterprise local switching.¹³ Accordingly, Verizon asserts that impairment for DS-1 switching cannot be established and that the docket should be closed without further proceedings.¹⁴ The Department's subsequent September 26 Order requests that the Carriers address these claims in an Offer of Proof filed not later than October 9, 2003 (later modified in the October 14 Order to October 15, 2003). In response to these Verizon factual assertions and arguments, many of which are inaccurate, the Carriers offer the following detailed discussion of the true scope and importance of the enterprise DS-1 market in Massachusetts, the serious operational problems they have faced with

¹³ Verizon Comments at 7-9.

¹⁴ Id.

Verizon ever since DS-1 UNE-P became available in late 2001, nearly two years ago, and the need for the Department to continue to investigate these issues in this docket.

DSCI and InfoHighway are authorized CLECs focused on small-to-medium-sized business customers in all density zones. They offer a bundle of telecommunications and data services from a variety of facilities-based providers using a customer-friendly single bill format. Local voice services – the largest portion of the Carriers’ offerings – are generally provisioned using UNEs purchased from Verizon.

DSCI and InfoHighway both purchase substantial DS-1 UNE-P services for business customers, paying TELRIC rates. DSCI and InfoHighway originally served Massachusetts business customers on a resale basis. Following Department orders that established various Verizon network elements, including UNE-P, in late 2001, both Carriers began placing orders for Verizon to provision the Carriers’ new and existing customers on the new UNE-P platform, at the DS-1 (digital) or DS-0 (analog) levels. In fact, the combined base of Verizon DS-1 UNE-P service provided by Verizon to DSCI and InfoHighway is in excess of [confidential – xxx] DS-1 circuits, many times in excess of the amount cited by Verizon in its September 16 Comments and representing over [confidential - xxxxx%] of the market identified by Verizon. The Carriers are also aware of other UNE-P CLECs operating in Massachusetts (including BridgeCom and Met Tel) that also offer DS-1 services in the Commonwealth and likely have additional lines that amplify the competitive importance of the issues in this docket. It is likely that this percentage share would be substantially higher if the Carriers and other CLECs did not have to suffer through the operational problems in implementing the service over the past two years, as outlined in more detail below.

To date, DSCI has requested that Verizon provision [confidential – xxx] DS-1 UNE-P lines, many at separate locations in Massachusetts. This represents a very substantial segment of DSCI’s overall telecommunications business in the Commonwealth, in excess of [confidential -- \$xxxx] in annual revenues. These figures do not count substantial additional revenues from services delivered by DSCI at these same locations that also are subject to loss in the event that DS-1 UNE-P service is no longer available, including additional DS-0 voice grade lines to add redundancy and provide additional services (such as for facsimiles) and non-voice services (such as data, wide area network services and data security). DSCI’s customer base includes approximately [confidential – xxx] hospitals or health care facilities;¹⁵ [confidential – xxx] manufacturing facilities; [confidential – xxx] banking or finance locations; [confidential – xxx] state-funded human services locations; [confidential – xxx] educational institutions;¹⁶ law firms;¹⁷ telecommunications companies;¹⁸ and nursing homes. All of these locations are subject to financial and reputational losses in the event of prolonged service outages and all of them selected DSCI as their telecommunications service provider with the mutual understanding that they would receive seamless telecommunications services, at parity with what they would receive from Verizon.

Similarly, InfoHighway has requested that Verizon provision [confidential – xxx] DS-1 UNE-P lines at [confidential – more than xxx] separate locations in Massachusetts. InfoHighway’s DS-1 customer base includes approximately [confidential

¹⁵ Including, for example, [confidential – xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx].

¹⁶ Including [confidential - xx].

¹⁷ Including [confidential - xx].

¹⁸ Including [confidential – xx].

– xxx] government agencies¹⁹ and [confidential – xxx] health care facilities, including hospitals, as well as many single and multi-location business accounts. InfoHighway's revenues from these DS-1 orders (again, exclusive of same-location DS-0 and non-voice services) are also very substantial, in excess of [confidential - \$xxxxxxx] in annual revenues. InfoHighway's customers also signed up for service with the understanding that it would receive quality service at parity with Verizon retail.

B. *Operational Problems with Provisioning and Repair of DS-1 Orders*

Starting from the first attempted conversion of DSCI's resale circuits to DS-1 UNE-P in late 2001, Verizon has taken out of service approximately 40% of DSCI's customers that it attempted to convert, for periods ranging from one hour to 70 hours. Even though DSCI and Verizon personnel worked diligently during 2002 and early 2003 to minimize or avoid these conversion issues, as late as April, 2003, sixteen months after the first conversion attempt, Verizon took a DSCI customer out of service for 13.5 hours.

Given all of these problems, starting in December 2001, when the first phase of DSCI's resale to DS-1 UNE-P conversion project with Verizon resulted in a 75% failure rate, with service disruptions ranging from 3 to 6.5 hours, Verizon requested that DSCI allow Verizon to provision its pending and new DS-1 orders via a surrogate platform at DS-1 UNE-P rates pending resolution of operational issues.²⁰ InfoHighway, which due

¹⁹ Including [confidential – xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx].

²⁰ The 37 DS-1 lines referenced by Verizon appear to represent a substantial portion of the DS-1 lines provisioned, with difficulty, to DSCI during 2002 and early 2003. (The actual number is [confidential – xxxxxxxxx] DSCI DS-1 lines.) It does not include the [confidential – xxxxxx] additional lines placed by DSCI and InfoHighway at Verizon's request using the surrogate DS-1 platform, due to Verizon's inability to provision or maintain DS-1 UNE-P lines. Given that each DS-1 circuit represents the equivalent of up to 24 voice grade lines, such circuits alone represent a significant competitive presence in the Commonwealth, providing nearly [confidential xxxx] in gross revenues to DSCI annually, plus additional revenues from analog lines and data, WAN and

to concerns of Verizon's technical difficulties had not ordered any DS-1 services migrated over to the UNE-P platform, also began placing substantial DS-1 orders using the surrogate platform.

Verizon's record at repairing and maintaining the UNE-P DS-1 circuits that they managed to successfully convert from resale to UNE-P has been disastrous. Of DSCI's 43 circuits that have been converted from resale to DS-1 to date, 44% have had repair tickets and trouble reports that have ranged in length from 1.5 hours to 12 days. Most of these repairs required the customer to be out of service for all or a substantial portion of the time the ticket was open. As recently as last month, a DSCI customer experienced a 137 hour (just under 6 days outage.

C. *Transition/Migration Issues*

Migration from Verizon UNE-P or surrogate platforms to CLEC-provided unbundled switching would be an enormously complex endeavor for all involved. As an illustrative example, the steps needed to migrate only one common type of DS-1 circuit, a primary rate interface ("PRI") circuit, could include the following:

- ?? The CLEC must order and install a DS-1 loop and inter-office transport facilities ("IOF");
- ?? Transmission facilities must be made operational and tested for basic transmission capability;
- ?? The equivalent switch operations must be established in the CLEC network that were being utilized by Verizon to serve the end user (both the physical switch operations and software applications for PRI circuits) which involve the following steps:
 1. Determine Verizon's PRI settings. Note that PRI interfaces have a variety of user-adjustable settings between the customer premises equipment and the switch. Before a PRI circuit can be migrated, the exact settings must be

other non-voice services at the same locations. The impairment and migration associated with these [confidential – xxxxxxx] circuits alone would justify investigation in this docket.

known so that the new switch will interoperate with the customer PBX in exactly the same way.

2. If the switch-types are different (such as you are moving from a Lucent to a Nortel switch), then an added complexity – mapping the old settings to the new settings in a way that the customer experience is transparent – arises.

?? New CLEC settings must be mapped for transparent operation by the customer.

?? The vendor must set primary branch exchange (“PBX”) settings at the end user’s premises.

?? Testing must be conducted to confirm that the circuit is up and running.

?? Local Number Portability (“LNP”) must be performed with the cutover.²¹

The Carriers (especially DSCI) inquired repeatedly about Verizon’s processes for migrating customers from UNE-P or surrogate to other platforms, such as a UNE-P like service available from a facilities-based CLEC, a competitively provided switching facility (combined with UNE loops and transport) or other arrangements.

Verizon has conceded that it has not established a process for the “hot cuts” and other steps needed to migrate a DS-1 UNE-P customer from Verizon’s network over to a CLEC network or a serving arrangement that involves a non-Verizon switch. Indeed, on June 18, 2003, DSCI’s President (Sean Dandley) traveled to New York City for a meeting between the Senior Vice President of Verizon Wholesale (David Small) and the Vice President/Wholesale of a facilities-based CLEC. At the meeting, DSCI requested that Verizon undertake a trial involving Verizon, DSCI and this facilities-based CLEC to investigate how to accomplish a seamless migration of digital circuits from Verizon UNE-P to CLEC-providing switching. Despite repeated requests and reminders from DSCI, Verizon has to date failed to inform the Carriers of any steps to date towards developing DS-1 migration processes or initiating a DS-1 migration trial.

²¹ Other types of DS-1 circuits (including D4, AMI coded circuits) would require similarly complex migration processes.

It also should be noted that Verizon has no economic incentive to perform the work needed to develop seamless migration processes for DS-1 UNE-P circuits. If they do so, they not only facilitate the growth of facilities-based competition in an important market segment but also will lose UNE-P CLECs as wholesale customers, depriving Verizon of substantial annual revenues. The Carriers also note that they cannot feasibly respond to a no impairment finding by migrating DS-1 customers to DS-0 UNE-P service. In addition to pricing issues, DS-1 UNE-P customers commonly use customer premises equipment that are specially configured for use with digital DS-1 lines, and cannot work with analog DS-0 lines without expensive hardware changes. Such expenses and pricing changes would render DS-0 service uneconomic to the Carriers' DS-1 customers. Finally, the labor intensive and time consuming nature of the above Verizon switching to CLEC switching migration process, without any Verizon experience or established procedures in place, starkly contrasts to the migration process in the event one of the Carriers' DS-1 UNE-P customers elects to return to Verizon retail. Verizon can take a DSCI or InfoHighway UNE-P enterprise customer back to Verizon retail seamlessly by means of a simple billing records change.²²

²² Indeed, DSCI recently lost a DS-1 customer provisioned via UNE-P to Verizon retail in which the customer reported that the Verizon representative guaranteed that the customer would not experience any downtime while migrating back to Verizon.

Argument

I. THE DEPARTMENT SHOULD CONDUCT THIS PROCEEDING AND UNDERTAKE A WAIVER PETITION TO THE FCC FOR EXISTING ENTERPRISE CLEC DS-1 SWITCHING CUSTOMERS

The Order expressly required docket participants to address at minimum all evidence of operational and economic impairment and whether CLEC deployment of switches demonstrates that CLECs are not impaired without access to UNE-P.²³ As demonstrated in the Factual Background/Offer of Proof section above, the Carriers are operationally impaired relative to enterprise DS-1 switching irrespective of the number of CLEC-provisioned switches that exist in the Commonwealth. Until Verizon establishes a reliable process to cut over CLEC customers from Verizon's UNE-P or surrogate platforms in a seamless manner to alternative arrangements that employ non-ILEC switching, the Carriers are operationally impaired, at minimum with respect to their existing customer bases.

The Factual Background/Offer of Proof section discusses the absence, to date, of any Verizon process whatsoever to cut over UNE-P customers to CLEC-provided switching arrangements. In contrast to DS-1 loop cutovers, which have been accomplished (albeit with their own set of operational difficulties and problems), DS-1 switch cutovers require that the CLEC first secure, initiate and test a parallel set of loop and IOF facilities, then all parties must make complicated and coordinated adjustments to ILEC switch features, CLEC switch features and customer premises equipment, and, finally, all facilities must be tested and confirmed available. Verizon has no established process for accomplishing these many steps needed to migrate a UNE-switching

²³ The geographic areas information requested by the Department is addressed in Section II below.

enterprise customer to alternative arrangements. Indeed, to the Carriers' knowledge, Verizon has never even attempted such a cutover anywhere in the Verizon service territory.

The consequence of a decision to close this docket without further proceedings now or at the end of the 90-day period likely would devastate the Carriers and other CLECs, and their many customers across the Commonwealth. Verizon has had significant problems provisioning and maintaining CLEC UNE-P DS-1 services delivered over its own network. Migrations over to alternative switching facilities without any Verizon process in place will be a nightmare. Hundreds of businesses with thousands of employees and many thousands of customers or users could be cut off from service for hours or even longer, causing a grave potential for loss of business. In the case of hospitals, health care facilities, government offices and the like, service disruptions would cause substantial harm to individuals or the broader public. The Department should not allow these problems to occur, certainly not without, at minimum, investigating and verifying Verizon's plans for transitioning CLEC customers to alternative arrangements.

II. THE DEPARTMENT SHOULD PETITION THE FCC FOR ADDITIONAL TIME TO ALLOW EVIDENCE OF BROADER ECONOMIC AND OPERATIONAL IMPAIRMENTS WITHIN THE COMMONWEALTH.

In addition to the operational impairments relative to the existing customer bases or the Carriers and other CLECs using DS-1 switching, discussed in Section I above, the Order also required participants to address (1) "specific geographic markets to be considered in making an impairment decision," (2) "all facts that will demonstrate the

existence or nonexistence of impairment in the proposed geographic markets.”²⁴ The TRO recognized that “a geographically specific analysis could possibly demonstrate that competitive carriers are impaired without access to unbundled incumbent LEC local circuit switching for DS-1 enterprise customers in a particular market,”²⁵ and that UNE-P carriers could suffer specific “cost and operational disadvantages” that could make it economic to serve enterprise customers only through ILEC-supplied local switching in certain market segments.²⁶ Therefore, the FCC created a procedural mechanism whereby UNE-P carriers can present data to individual state commissions showing that they are impaired without access to ILEC-supplied local switching.²⁷

In examining whether operational impairment exists, the FCC ordered states to “consider whether incumbent LEC performance in provisioning loops, difficulties in obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC, or difficulties in obtaining cross-connects in an incumbent’s wire center, are making entry uneconomic.”²⁸ Regarding economic criteria, the FCC requires states to “consider all relevant factors in determining whether entry is uneconomic in the absence of” unbundled switching.²⁹ Specifically, the FCC held that states “must find that entry into a particular market is uneconomic in the absence of unbundled local circuit switching” and in doing so, must “weigh competitive LECs’ potential revenues from

²⁴ Order, p. 1.

²⁵ TRO, ¶454.

²⁶ Id.

²⁷ Id., ¶¶454-458.

²⁸ Id., ¶ 456.

²⁹ Id., ¶ 458 (emphasis added).

serving enterprise customers in a particular geographic market against the cost of entry into that market.”³⁰ In evaluating “potential revenues” the states must consider all likely revenues to be gained from entering the enterprise market, as well as the prices that CLECs are likely to be able to charge, after considering the retail rates that ILECs charge.

The Carriers strongly believe, and contend, that substantial geographic areas of the Commonwealth would meet the economic and operational impairment standards established in the TRO, such that a discontinuance of UNE-P and UNE switching services in those areas would eliminate the only viable source of competition to Verizon for enterprise business customers. The Carriers understandably follow the DS-1 marketplace closely and have identified substantial areas in the Commonwealth that presently lack any availability of CLEC-provided DS-1 facilities. After 20 months of research the Carriers have not been able to identify an alternative provider, or combination of providers, to Verizon that can provide economically priced ubiquitous state-wide coverage for DS-1 service. This underscores the Carriers' contention that they will remain operationally or economically impaired in many places, even after Verizon is able to develop DS-1 hot-cut procedures. Many of these geographic areas may remain impaired indefinitely, others may be contestable by CLECs within a few years, but they are impaired at the present time.

The FCC has required the Department, and every other state commission, to do the impossible in a 90-day proceeding: to complete a significant number of complex and integrally-related tasks associated with rebutting the national impairment finding regarding the DS-1 market. A number of the determinations that the Department will be required to make in the 9-month mass market switching proceeding are equally essential

³⁰ Id., ¶ 457.

to resolve the inquiries required in the 90-day enterprise market proceeding. In the 9-month proceeding the Department is charged with, among other tasks, developing geographic market definitions for local switching and defining the product market (*i.e.*, crossover from the “mass market” to the “enterprise market”).³¹ However, due to “the expected difficulties and detailed information needed in conducting the [customer and geographic market] inquiry,” the FCC ruled that the product market and geographic market determinations will not be available until the state commissions complete the 9-month proceeding for mass-market UNE-P customers. In effect, the FCC required UNE-P carriers to provide data for specific customer and geographic markets at least six months before the relevant market definitions are to be established. The combination of requiring CLECs to provide “all relevant evidence” on economic and operational impairments for enterprise markets on a geographic area basis, when those classifications needed to undertake the analysis will not be finalized for many months is, literally, impossible to complete in 90 days. The Carriers are making this point to the FCC and appellate courts.³²

Given the critical need for competitive alternatives to Verizon for business customers across the Commonwealth and the impossibility of completing the investigation and preparing a waiver petition by the December 31, 2003 deadline, the Department should petition the FCC for a waiver that would allow the Carriers to

³¹ Id., ¶¶ 508-10.

³² The Carriers and several other CLECs have sought a stay of this portion of the TRO from both the FCC and federal appellate courts. See Emergency Stay Petition of InfoHighway Communications and Manhattan Telecommunications Corp., CC Dockets 01-338, 96-98, 98-147 (filed Sept. 22, 2003); see also Motion for Stay Pending Judicial Review, FCC Case 03-36 (2nd Cir. September 30, 2003). A temporary stay of the 90 day portions of the TRO was granted by the Second Circuit on October 8, 2003. Review of the CLEC appeals and the stay ultimately is likely to be transferred to the District of Columbia Circuit in the upcoming weeks.

investigate and substantiate the specific geographic areas that remain impaired under the FCC's standards after the conclusion of the mass markets investigation in Docket 03-60. At that point, the geographic markets should have been determined, the specific definition of what constitutes the enterprise market should have been defined, and the Carriers can proceed to undertaking narrowly tailored factual inquiries and offering concrete testimony as to the specific geographic areas where service remains impaired and UNE-P and UNE switching should remain available in order to permit competition to Verizon.

III. THE DEPARTMENT SHOULD SUSPEND VERIZON RATES FOLLOWING A NO IMPAIRMENT FINDING UNTIL SUCH TIME AS THEY ARE DETERMINED TO ACCORD WITH THE APPLICABLE "JUST AND REASONABLE" RATE STANDARD.

Under section 271 of the Act, Regional Bell Operating Companies ("RBOCs"), such as Verizon, have an independent obligation to provide competitors with local circuit switching at rates, terms and conditions that are "just and reasonable" and not unreasonably discriminatory, in compliance with sections 201 and 202 of the Act, including all forms of DS-1 service. Specifically, the FCC held in the TRO that section 271(c)(2)(b) establishes an independent obligation for BOCs to provide access to loops, switching, transport and signaling regardless of any unbundling required under section 251.³³ The FCC held that the applicable pricing standard for elements required to be provided pursuant to section 271 is "whether they are priced on a just, reasonable and not unreasonably discriminatory basis," the standards set forth in sections 201(b) and 202(a) of the Act.³⁴

³³ TRO, ¶ 653.

³⁴ Id., ¶ 656 (discussing 47 U.S.C. §§ 201(b), 202(a)).

In order to ensure that the rates charged by Verizon whenever local switching is made available under section 271 are in all cases just and reasonable, the Department should adopt an order requiring that the current rates for unbundled local switching remain in effect until the Department has determined that any replacement rate Verizon seeks to charge meets the sections 201 and 202 pricing standard. Under the authority granted to the Department to establish rates for intrastate telecommunications services, the Department has ample authority to establish rates of local circuit switching required to be made available pursuant to section 271.

The Department should look to market prices where a market exists, in determining what constitute just and reasonable prices under sections 201 and 202 of the Act. An examination of the current market in Massachusetts reveals that wholesale prices for unbundled local switching are in a range close to the Department-approved TELRIC rates in effect now, and the Carriers submit that Verizon has no basis to argue that ‘just and reasonable’ rates for unbundled switching differ from the current TELRIC rates. Accordingly, the Department should exercise its power pursuant to federal and state law to require Verizon to keep those current rates in effect.

The only way for the Department to ensure that Verizon fulfills its obligations under section 271 is to require continuation of the current rates – which have been determined to be just and reasonable – until any replacement rates can be judged as against the statutory standard of sections 201 and 202. Interconnection agreements of several CLECs contain change of law provisions that establish a process for changes caused by new legal developments and provide that unresolved disputes over pricing changes should be decided by the Department. The Department should avoid confusion

and harm to the competitive markets by staying any DS-1 UNE pricing changes applicable to all CLECs pending resolution of the lawfulness of a successor rate.

Conclusion

For the above described reasons, the Carriers request that the Department:

- (1) undertake an investigation into the provision of UNE switching for enterprise customers in accordance with the above-described guidelines;
- (2) file a petition with the FCC rebutting the national finding that access to unbundled switching is not impaired for use in serving enterprise customers over high capacity (DS-1 and above) facilities relative to existing customers of DS-1 UNE-P CLECs, including the Carriers, at least until Verizon can demonstrate the ability to transition DS-1 services over to CLEC switches in a seamless fashion;
- (3) file a petition with the FCC requesting a waiver to allow the Department to decide broader impairment issues in Massachusetts beyond the 90-day period specified in the TRO;
- (4) in the event of a no impairment finding, rule that a “just and reasonable” rate for UNE switching and/or UNE-P should remain at their current TELRIC rates, pending a determination of a rate for such UNEs that would comport with federal “just and reasonable” rate principles established in 47 U.S.C. §§ 201 and 202; and
- (5) make other any findings, recommendations or waiver requests that the Department deems necessary or appropriate.

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